

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Aug 03, 2016

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES P.E. O'NEEL, an individual,

Plaintiff,

v.

CHEWELAH BASIN SKI CORP. dba
49 DEGREES NORTH, and the
UNITED STATES OF AMERICA,

Defendants.

No. 2:16-CV-0018-SMJ

**ORDER GRANTING UNITED
STATES' MOTION TO DISMISS**

On July 26, 2016, the Court held a hearing on Defendant United States' Motion to Dismiss for Lack of FTCA Jurisdiction, ECF No. 17. This Order memorializes and supplements the Court's oral ruling.

Plaintiff James O'Neil sued the United States and Chewelah Basin Ski Corp., the operator of a ski resort on U.S. Forest Service land, for personal injury he sustained after landing a ski jump. ECF No. 1. O'Neil sued the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671-2689 *et seq.* The United States filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the Discretionary Function Exception and Independent Contractor Exception apply to divest the Court of FTCA jurisdiction in this case.

1 As a sovereign, the United States is immune from suit unless it waives that
2 immunity. *Chadd*, 794 F.3d at 1108. Through the Federal Tort Claims Act, the
3 United States enacted a partial waiver of its sovereign immunity, making itself
4 amenable to suit “under circumstances where the United States, if a private person,
5 would be liable to the claimant in accordance with the law of the place where the
6 act or omission occurred.” 28 USC 1346(b)(1). Congress exempted some broad
7 classes of tort claims from this waiver including the discretionary function and
8 independent contractor exceptions.

9 Discretionary function exception

10 The discretionary function exception retains sovereign immunity for any
11 claim based on the exercise or performance or failure to exercise or perform a
12 discretionary function or duty on the part of a federal agency or an employee of the
13 government, whether or not the discretion involved is abused. 28 USC 2680(a).
14 The exception is designed to prevent judicial second-guessing of legislative and/or
15 administrative decisions grounded in policy. *Chadd*, 794 F.3d at 1108.

16 The Supreme Court has established a two-step process for evaluating whether
17 a claim falls within the discretionary function exception. First, a court examines
18 whether the government's actions are discretionary in nature, acts that involve an
19 element of judgment or choice. *United States v. Gaubert*, 499 U.S. 315, 322, 111
20 S.Ct. 1267, 113 L.Ed.2d 335 (1991). In making this examination, it is “the nature

1 of the conduct, rather than the status of the actor, that governs whether the
2 discretionary function exception applies in a given case.” *United States v. S.A.*
3 *Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813, 104
4 S.Ct. 2755, 81 L.Ed.2d 660 (1984). If there is a statute or policy directing
5 mandatory and specific action, the inquiry comes to an end because there can be no
6 element of discretion when an employee has no rightful option but to adhere to the
7 directive. *Terbush v. United States*, 516 F.3d 1125, 1129 (9th Cir.2008).

8 Second, even assuming the challenged conduct involves an element of
9 judgment, it remains to be decided whether that judgment is of the kind that the
10 discretionary function exception was designed to shield. *Gaubert*, 499 U.S. at 322–
11 23. The exception protects only government actions and decisions based on social,
12 economic, and political policy. *Miller v. United States*, 163 F.3d 591, 593 (9th
13 Cir.1998). However, the exception “is not confined to the policy or planning level”
14 and extends to “the actions of Government agents.” *Gaubert*, 499 U.S. at 325, 323.

15 *Step 1.* The United States argues that no law or contractual provision directs
16 mandatory or specific action related to monitoring ski areas operating on Forest
17 Service land, so the first step of the exception is satisfied. O’Neil argues that the
18 special use permit—a contract between 49 Degrees North and the U.S. Forest
19 Service—directs specific action that is nondiscretionary.

1 First, O'Neel cites a section of the permit requiring signs on the property to
2 be approved by the Forest Service.

3 E. Signs. Signs or advertising devices erected on National Forest
4 System lands shall have prior approval by the Forest Service as to
location, design, size, color, and message. Erected signs shall be
5 maintained or renewed as necessary to neat and presentable standards,
as determined by the Forest Service.

6 ECF No. 18-6 at 4. This is not the kind of contractual provision that divests the
7 United States of discretion. It does not say exactly what kind of sign is required
8 where. Rather, it requires 49 Degrees North to submit sign designs to the Forest
9 Service for approval.

10 Second, O'Neel cites a section of the permit requiring Forest Service
11 approval of improvements.

12 All required plans and specifications for site improvements, and
13 structures included in the development schedule shall be properly
certified and submitted to the Forest Service at least forty-five (45)
14 days before the construction date stipulated in the development
schedule.

15 ECF No. 18-6 at 3. O'Neel assumes that the ski jump at issue here is an
improvement. The Court does not believe it is. But even if it were, this is again not
16 the kind of contractual provision that divests the Forest Service of discretion. It does
not provide metrics by which the Forest Service must evaluate a plan or
17 circumstances under which a plan may not be approved. Rather, it merely requires
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1 the operator to submit plans 45 days before the construction date. It does not create
2 a mandatory, specific duty.

3 The Court has reviewed the Special Use Permit and has concluded not only
4 that no provision divests the United States of discretion in this circumstance, but
5 also that the permit explicitly commits the responsibility to maintain safety to
6 Chewelah. And contrary to Plaintiff's argument, the United States may delegate its
7 duty to monitor for safety. *Akers v. US*, 2002 WL 32513820, *15-16 (D. Or. 2002);
8 *Berrien v. US*, 711 F.3d 654, 658 (6th Cir. 2013); *Andrews v. US*, 121 F.3d 1430,
9 1440 (11th Cir. 1997).

10 Step 2. O'Neal argues that "there was no policy analysis because no decision
11 was actually made" so this was not the type of decision protected by the
12 discretionary function exception. ECF No. 27 at 17. O'Neal misapprehends the
13 law. The fact that a decision involving policy considerations was not officially
14 made is irrelevant. The decision giving rise to liability need not be actually
15 grounded in policy considerations, but rather must be susceptible to a policy
16 analysis. *Miller v. United States*, 163 F.3d 591, 593 (9th Cir. 1998). The Forest
17 Service has limited resources. Allocating these resources involves consideration of
18 competing policy interests of the kind that this exception was designed to protect.
19 The Forest Service is charged with managing national forests all over the country.
20 It has discretion to permit developed skiing opportunities in addition to many other

1 possible activities. The policy issues underlying a decision to permit skiing are
2 obvious—water use, runoff, wildlife preservation, etc.

3 Much of Plaintiff's argument focuses on the duties imposed on landowners
4 by Washington law. This is irrelevant to the FTCA jurisdiction analysis. Because
5 no law or contractual provision divests the Forest Service of discretion in dealing
6 with matters related to terrain parks on federal land and the decision on how to
7 monitor such a park is policy-based, the discretionary function exception applies.

8 Independent contractor exception

9 O'Neal asserts that the United States is liable for the negligent act of an
10 employee or employees of the Chewelah Basin Ski Corp. in creating the ski jump
11 off which he crashed.

12 The United States is not liable for the negligence of an employee of an
13 independent government contractor. 28 USC 2671; *Brooks v. AR&S Enterprises*,
14 622 F.2d 8 (1st Cir. 1980). The question, then, is whether the Chewelah Basin
15 employees are federal employees or employees of an independent contractor. The
16 critical factor in determining whether an individual is a federal employee rather than
17 an independent contractor is the power of the Federal Government to control the
18 detailed physical performance of the individual. *United States v. Orleans*, 425 U.S.
19 807, 814 (1976). There must be substantial supervision over the day-to-day
20 operation of the contractor in order to find that the individual was acting as a

1 government employee. *Autery v. United States*, 424 F.3d 944, 957 (9th Cir. 2005).
2 The Court has reviewed all applicable documentation and has found no evidence
3 that the Forest Service has any authority whatsoever to direct the day-to-day actions
4 of Chewelah Basin employees. And in fact, Plaintiff admitted that it is “not taking
5 the position that 49 Degrees North was an employee of the Forest Service.” Hearing
6 transcript at 10:18 AM. The Court concludes that the independent contractor
7 exception to the FTCA also applies.

8 Because both exceptions to the FTCA waiver apply, this Court lacks subject
9 matter jurisdiction over the United States in this matter.

10 Accordingly, **IT IS HEREBY ORDERED:**

- 11 1. Defendant’s Motion to Dismiss for Lack of FTCA Jurisdiction, ECF
12 **No. 17**, is **GRANTED**.
- 13 2. The claims against the United States are **DISMISSED WITHOUT**
14 **PREJUDICE**.

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3. The Clerk's Office is directed to **AMEND** the caption to read as follows:

JAMES P.E. O'NEEL, an individual,

Plaintiff,

V.

CHEWELAH BASIN SKI CORP. *dba* 49 DEGREES NORTH,

Defendant.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel.

DATED this 3rd day of August 2016.

Salvador Meneza Jr.
SALVADOR MENÉZEA, JR.
United States District Judge